Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141

REPLY COMMENTS OF IP COMMUNICATIONS CORPORATION ON THE NOTICE OF PROPOSED RULEMAKING RELATING TO PERFORMANCE MEASUREMENTS AND STANDARDS FOR UNBUNDLED NETWORK ELEMENTS AND INTERCONNECTION

Howard Siegel
Vice President of External Affairs and
Regulatory Policy
IP Communications Corporation
9430 Research Blvd
Echelon II, Suite 120
Austin, Texas 78759
512/418-0376
781/394-6428 (fax)
512/659-7012 (cell)
hsiegel@ip.net

February 12, 2002

TABLE OF CONTENTS

Page

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141

REPLY COMMENTS OF IP COMMUNICATIONS CORPORATION ON THE NOTICE OF PROPOSED RULEMAKING RELATING TO PERFORMANCE MEASUREMENTS AND STANDARDS FOR UNBUNDLED NETWORK ELEMENTS AND INTERCONNECTION

On November 19, 2001, the Federal Communications Commission's ("FCC" or the "Commission") released its Notice of Proposed Rulemaking relating to performance measurements and standards for unbundled network elements ("UNEs") and interconnection in the above captioned docket numbers ("*PM NPRM*" or "*NPRM*"). In that *NPRM,* the Commission seeks comment regarding incumbent local exchange company ("ILEC") performance requirements and reporting obligations necessary to demonstrate compliance with Sections 251 and 271 of the federal Telecommunications Act of 1996 ("FTA"). In these comments, IP Communications Corporation ("IP") replies to specific comments of SBC with

additional references to comments of the Public Utility Commission of Texas ("TPUC"), Birch Telecom ("Birch"), and the Competitive Telecommunications Association ("Comptel"). IP is a Competitive Local Exchange Carrier ("CLEC") whose offerings provide broadband solutions to its customers and will be immediately affected by the ruling on the *NPRM*.

INTRODUCTION AND SUMMARY

This Commission has consistently, forcefully and correctly discussed performance measures as one of the critical pillars on which local competition is built. For example, in 271 orders this Commission has issued, the Commission has emphasized the importance of comprehensive performance measures that will capture data regarding performance and contain a self-executing performance penalty plan that would assure adequate and timely penalties to give ILECs the incentive to adjust their behavior and maintain proper performance once achieved. Critical to those 271 applications that have been approved was the comprehensive and disaggregated measures that would capture performance by location and/or service type to prevent situations where better performance in one area could mask poor performance in another. While it is worthy to ask the question as the Commission has regarding the interplay between compliance costs, benefits to compliance with necessary performance standards, and the federal-state partnership that is woven into the federal Telecommunications Act ("FTA"), what must not be lost is the historical importance that this Commission, state commissions, competitors, and investors have placed on the existence of effective and enforceable performance measures to achieve a competitive market nor the prospective importance of those same measures to maintain the integrity of that competitive market once it exists. The Public Utility Commission of Texas ("Texas PUC" or "TPUC), for example, "gets it". Its comments point out the importance of detail and the importance of the fact-based discussions that take place at the state level to assure

that all relevant performance is captured. SBC, on the other hand, appears to substantially demolish the performance measure pillar by proposing that the great majority of competition and customer–affecting measures no longer be captured. Moreover, even on the few, i.e. 9, measures that SBC graciously supports, SBC seeks such extreme aggregation that dramatic inequities and unreasonable performance would be covered up. Additionally, SBC's position regarding standardization is a far cry from its current positions in state proceedings where it opposes such standardization. It doesn't take an architect to understand what happens to the structure of local competition if one of the most important supporting pillars crumbles. IP implores the Commission to consider the great importance of comprehensive, disaggregated, and self-executing performance measures and find that states like Texas, which have taken the bull by the horns and to develop a necessary performance measure structure, must not have their work and role watered down in the name of simplification.

I. POSITION'S TAKEN BY SBC IN ITS COMMENTS ARE CONTRARY TO THE FACTUAL RECORDS DEVELOPED IN STATE PROCEEDINGS AND COUNTER TO SBC LITIGATION STRATEGY IN ITS SOUTHWESTERN BELL REGION

Throughout the comments of SBC, SBC seeks to eliminate existing state jurisdiction with regard to performance measures while seeking to almost entirely remove reporting requirements and the self-executing penalty structures that have been developed to incent improved results. Nowhere does SBC discuss, however, the simple truth that states, like Texas, were required to develop the performance measures and performance penalty structures to implement their statutory obligations under section 251 and section 271 of the Act. SBC never acknowledges that the existing measures were developed in mediation and arbitration settings that were able to consider far greater detail as to factual realities than can be done in response to an NPRM. Moreover, SBC never acknowledges that most of the measures in place throughout the SWBT

region, including their many disagregations, were agreed to by SWBT as part of the mediation process that paralleled the initial Texas SWBT/AT&T arbitration in 1996 and then later the collaborative process during the Texas 271 proceeding.

In these reply comments, IP demonstrates that the position taken by SBC, and other ILECs in this proceeding, are groundless. Particularly, the diminutive value they place on the performance measures instituted by state commissions is without justification. Second, the compliance cost concerns raised by SBC and others are put in context as to their relatively small scale given the need for comprehensive and meaningful performance measures. Third, IP shows the contradiction between the "uniformity" position taken by SBC in this proceeding and the "do not require me to act uniformly" position SBC has taken recently at the state level. Finally, IP provides supporting comments to a number of positions taken by the TPUC and Comptel.

A. The Critical Role Played by Performance Measures

The importance of comprehensive, meaningful, and self-executing performance measures cannot be overstated. SBC, however, suggests that its recommended 9 performance measures will be sufficient to capture "the critical aspects of wholesale performance". Such a statement is easy outside of a hearing context. Such statements can be made without probing questions from CLECs or Commission staff in a live setting regarding wholesale performance in the context of collocation, UNE-P, resale, high capacity loops, xDSL, etc. Instead, without the necessary probing that takes place at the state level, SBC can make statements suggesting the complete omission of UNE-P and resale performance measures, the aggregating of apples and oranges, e.g. analog loops with high capacity loops with xDSL loops, and the removal of countless existing measures without any comment at all. If nothing else demonstrates the inappropriateness of the FCC taking performance measure jurisdiction away from the states, this sort of seeking drastic change from today's reality without having to provide substantial detail on the existing reality certainly demonstrates it.

That said, it is not a surprise that SBC and others attempt to sail over and away from the facts and the factual reviews that have taken place over the last five years. This is because the closer one looks at the facts, the even more overwhelming is the conclusion that 9 or 12 performance measures would barely scratch the surface. To avoid detailing every measure, IP refers to the performance measures attached to the comments of the TPUC, which are labeled "Version 2.0". Despite SBC's complaints regarding the TPUC measures, the earlier version of which SWBT adopted in other states to obtain Section 271 Approvals, the measures in Texas are an excellent example of performance measures designed to measure performance that is competition and/or consumer affecting. That is the standard utilized by the TPUC; and as stated above, the vast majority of measures and disagregations were developed and agreed to by the parties with the TPUC taking a mediator's role. Only where there were substantive disputes that could not be resolved has the TPUC imposed a decision consistent with Section 251 of the FTA. And while no set of measurements will be 100% perfect because knowledge improves over time, the Texas PUC has developed a six-month review process, which are attended by other SWBT states, to review performance measures on a case-by-case basis to remove, add, or modify measures as appropriate.

IP has stated numerous times on and off the record in Texas and elsewhere that IP would hope to never receive a penalty payment because all of the competition and consumer-affecting performance meets a high degree of quality. Unfortunately, that has not been the case. In Missouri, for example, on January 8, 2002, the Missouri PSC Staff issued a report analyzing performance by SWBT over the period from August through October of 2001. In that report, 23 measure disagregations were listed as being missed two out of those three months. Of those 23 disagregations, 11 were specifically related to DSL. The same results with DSL performance has been demonstrated elsewhere in the SWBT region. Yet, SBC seeks to take away this critical transparency into SWBT's performance by eliminating many measures and masking its performance in the area of DSL by hiding it in an aggregated combination of all loops and performance. Such a result would be disastrous to DSL providers, like IP, and consumers of

DSL services and is no better than the absurd position taken by SBC to omit UNE-P and Resale from all performance measurement.[1]

The SBC position is also counter to the FCC's precedent in this area. In 271 proceedings, for example, the FCC has strongly stated the importance of the on going reporting commitment contained in the 271 application as necessary to assure ongoing compliance with Section 271. Similarly, the FCC has been skeptical of CLEC "anecdotal" evidence even to the point of accepting a SBC counter to true allegations by IP during a recent 271 proceeding only to have to fine SBC for providing false affidavits.[2] If the FCC removes the overwhelming number of performance measures and fails to have sufficient disaggretation, like that ordered in Texas, then the FCC will never have anything other than "anecdotal" evidence. Certainly that is not the FCC's intent and could not be in the public interest. Instead, the comprehensive and reasonable measures in place in the SWBT region provide a worthy base-line of transparency into ILEC performance. Without such transparency, no CLEC or state commission will be able to adequately enforce ILEC section 251 obligations. Moreover, the ILEC loses this most critical incentive to provide a high level of service to CLECs, who are both customers of and competitors to the ILECs.

B. Complex and Divergent Responsibility by Definition Will Require Complex and Disaggregated Monitoring

Although ILECs seek to focus on the number of measures existing in many states as "too many" and much discussion has been made regarding the fact that the NPRM lists far fewer performance measures, state commissions owe no apology for having performance measures numbering over 100. ILECs have enjoyed saying over the last few years that local is "hard" and that because local is hard, one cannot expect local order handling to be as simple as a PIC change in long distance. The ILECs are correct that local is harder than long distance. The types of

[1] Similarly, the TPUC stated its belief "that the apparent omission of resale and UNE-P from the proposed measurements will have a chilling effect on a significant segment of the competitive market. Comments of the Public Utility Commission of Texas at 5. See also Comments of Birch Telecom.

[2] See DA-01-2549.

activities and the number of parameters to provide circuits to carriers are more complex. With that complexity, comes more numerous processes and failure points. With a greater number of failure points and a greater number of ways to affect customers and competitors, it is only logical that there will be a greater number of measures. As alluded to earlier, when detailed discussions take place to a detailed degree at the state level, the result is a deeper understanding of the complexity and the areas in which ILECs must be monitored. Using DSL as an example, it is through such a process that performance measures relating to the timeliness of loop make-up information were developed. And, it was through this form of detailed analysis that necessary timing benchmarks were established.

In addition to local being relatively complex, local markets and methods of delivery are not monolithic. Some carriers utilize the ILEC's statutory obligation to provide resale as their mode of delivery; other carriers utilize UNE-P, others utilize UNEs separately or in other combinations, and others interconnect with the ILEC. All of these methods of delivery and competition are valued under the FTA and the ILEC obligation to provide appropriate levels of service apply to them all. It is simply unlawful for an ILEC to provide inappropriately poor service to resellers and UNE-P providers and such poor performance must be captured by self-executing performance measures if there is going to be transparency into such unlawful performance. Similarly, IP as a DSL provider is entitled, and the ILEC is obligated to provide, the appropriate level of service on IP's DSL-related loops, including standalone, line sharing, and line splitting. As a result, the many levels of disaggregation are required to monitor the related ILEC performance.

Also in this area, one additional point must be made. SBC, for example, attempts to treat the fact that there are over 100 performance measures in Texas as a noose around the TPUC's throat. As discussed above, if that is the number of performance measures needed to ensure proper compliance with the FTA, then that alleged noose is better characterized as an Olympic gold medal. To the extent, however, one chooses to look at the number of measures, it must be pointed out that there are in actuality less than 100 separate measures. Although the Texas PMs,

and by extension the rest of the SWBT region, have performance measures broken out over 100 numbers, a substantial percentage of PMs measure the same things in different contexts. For example, the resale and POTS measures are reported as separate performance measures from separate UNEs as part of the historic structure of the PMs when they could be rewritten as disaggregations of the same measure. Similarly, many of the DSL measures have been reported as separate measures rather than as disaggregations of similar measures to avoid adding complexity to the PM's business rule. When taking these and other similar situations into account, the actual number of performance measures in Texas is probably in the range of 60–85.

C. Cost Relative to Benefit

As a reader of SBC's comments, IP, and likely others including the FCC, was amazed that SBC's annual recurring costs for performance monitoring was estimated, without verification from an independent review, to only be $33 million. The $33 million cost figure is even more amazing when placed into the context that SBC covers 13 states and approximately one-third of the country. Extrapolated over the entire country, the SBC estimate would suggest annual recurring costs of $99 million over the entire industry to assure the integrity of the competitive process in an industry with annual revenues in the $100s of Billions.

Given the great importance of performance measures to not only provide some needed information into the wholesale process on a day-to-day basis but also provide a base level of confidence to Wall Street and other investors, and the size and importance of the telecommunications industry, $99 million is a relatively small insurance policy.

Finally, in this area, to the extent ILECs suggest that the CLECs would oppose any form of cost recovery for such costs, in SBC's case the alleged $33 million. That position is not necessarily true. In a proper cost docket where a state commission was reviewing SBC's state specific common cost factor, it would certainly be a fair area of review to determine what portion of a state's pro rata share of that $33 million should be included in the state's common cost factor. It may very well be the case that when a state reviews the common cost factor in that

state, the recurring costs for performance monitoring would be included on a prospective basis, when reviewing all cost increases and reductions affecting that factor.

D. Premise Contained in ILEC Comments Underestimates State Commissions and CLECs

All parities should come into this proceeding with one common perspective. NOBODY wants performance measures monitoring and reporting to be more complicated than it should be. While parties do disagree on what should be measured, nobody argues to measure performance that a party does not believe is important or recommends inefficient processes just to make the process burdensome. Yet, many ILEC responses appear to take such an extreme perspective of the state process, thus calling into question what the fundamental underpinning of their positions is.

By way of example, states and industry participants have worked within regional approaches in order to keep monitoring and reporting as simple as possible. IP for one was a supporter of making the Texas measures available throughout the SWBT region. Moreover, IP participated in some of the Ameritech performance measure reviews. In the Ameritech proceedings, all of IP's positions followed one dominant policy, bring north to the SBC/Ameritech region PMs from the SBC/SWBT region. As a result, if one looks at the DSL measures in Ameritech and compares them to the DSL measures in Version 1.7 of the Texas/SWBT region measures, there is substantial similarity. Moreover, IP was not alone in this advocacy. Rhythms Links, when it was in business, largely followed the same dominant position. Birch Telecom, like IP, also seeks to continue the consistency in PMs across the SWBT-region.

The ILECs, and potentially the Commission, are under a mistaken perspective that a chaotic patchwork has developed with regard to performance measures. Such a perspective is inaccurate. There certainly are differences in performance measures from region-to-region. As SBC admitted, one size does not fit all. There are differences in systems from region-to-region

that necessitate some variability among performance measures. As a result, it is a mistake to view differences in one RBOC's region to another RBOC's region as evidence of patchwork development. Instead, PM development must be viewed within an RBOC and/or and RBOC's region. When such a review is made, there is a substantial amount of consistency and order within the PMs developed. In the SWBT region, for example, Version 1.7 of the PMs developed in Texas were implemented region-wide. In the Ameritech region, PMs are being managed through a regional process with substantial overlap with the SWBT measures. These developments are the result of responsible state regulatory and industry development that did not require a heavy hand from the FCC to implement.

D. *Contradictory Positions are taken by SBC at the state level*

If any party is placing a limitation on regional development of performance measures, it is SWBT. Since the development of Version 2.0 of the Texas performance measures, IP and other CLECs have sought to have the Version 2.0 update applicable in all of the other SWBT states. To exemplify this position, attached hereto, as Exhibit 1, is the joint reply comments of IP and Birch Telecom that were filed in Kansas in response to the position stated by SWBT in that state. As is evident in that pleading, it is the CLECs that demonstrated a willingness to accept both the wins and losses incorporated in Version 2.0 for the benefit of efficiency. It was SWBT that seeks to limit that consistency. It would be a great irony if ILECs, including SBC/SWBT, are able to successfully advocate the removal of performance measures and state jurisdiction based on the existence of differentiation when that differentiation, at least in the latest version in the SWBT region, would be caused by the ILEC over the objection of CLECs.

II. IP SUPPORTS POSITIONS TAKEN BY THE PUBLIC UTILITY COMMISSION OF TEXAS AND COMPTEL

As stated previously, the performance measures developed by the TPUC are a prime template for the development of PMs and performance penalty structure. In addition to those

accomplishments, the TPUC, like most commenting state commissions and CompTel, correctly addressed the appropriate scope of any resulting conclusions to this proceeding.

Specifically, the TPUC noted that all things being equal there is benefit to standardization: "the role that the state commission have historically played, creating, implementing, and monitoring the performance of ILECs, is vital to the continued viability of a competitive market."[3] Moreover, in conclusion the TPUC noted its belief "that action by the FCC that establishes consistent, minimum requirements or supplements that state plans will further facilitate competition, as long as the FCC ensures that any requirements it ultimately adopts are: 1) minimally, as stringent as the strongest state plans; and 2) do not preclude the states from adopting additional measures to the extent they are necessary."[4]

III. FLAWED DSL-RELATED EXCLUSIONS PROPOSED BY SBC

Although these comments strongly denounce the approach taken by ILECs to role back one of the successes of the FTA, in the abundance of caution, IP responds to two of the erroneous PM exclusions proposed by SBC. First, SBC proposes to exclude all trouble reports where the CLEC did not choose acceptance/cooperative testing.[5] Such a proposal misconstrues the purpose of such testing.

It is the ILEC's obligation to properly provision UNEs. Because of the historic high failure rate, CLECs, usually at their own expense, sought acceptance/cooperative testing to catch ILEC provisioning errors earlier in the process. In effect, the CLEC spends time and money to make up for ILEC errors while creating a false impression that the ILEC provisioning was better than actuality. The fact that a CLEC does not choose such testing resulting in trouble report counts that show the true rate of ILEC failure is not a reason for exclusion. All CLECs, and presumably ILECs, want to get to the point where ILEC provisioning is sufficient to allow CLECs to forego acceptance/cooperative testing in all but the most problematic circumstances.

[3] Id. at 2.
[4] *Id.* at 3.
[5] SBC Comments at 22-23.

Second, SBC seeks to exclude all trouble tickets when the loop make-up data showed a "need" for conditioning that the CLEC did not order.[6] Such an exclusion is overly broad. Certainly if the cause of the "trouble" was a loop inhibitor of which the CLEC was given notice but chose not to remove, the trouble ticket should be excluded. However, that must be the extent of any exclusion as opposed to excluding all trouble tickets without regard as to the corrective action required. A broader exclusion, such as that proposed by SBC, would not only include the valid circumstance for exclusion discussed above but also many trouble tickets that ought to be counted in any performance measure.[7]

IV. WHERE DOES THE COMMISSION GO FROM HERE?

As the majority of commenters suggested, caution is warranted. The existence of comprehensive and self-executing performance measures is of paramount importance to the development and continued existence of an irreversibly competitive market. Without the depth of performance measure development as exemplified by Texas, "irreversibility" cannot exist. Instead, any PM development by this Commission must be a minimum benchmark and should be based on the more detailed templates that have been developed.

IP also suggests caution in use of the term "core" as a label used for any set of PMs developed in this proceeding. Use of the term "core" elicits, either correctly or incorrectly, a suggestion that other measures are "non-core". That would do a disservice to the development of and revisions to performance measures in state processes. For example, how could a performance measure such as one that monitors LSR flow through be relegated to "non-core" status when this Commission has repeatedly noted the high level of importance placed on flow through as part of the 271 processes.

---

[6] SBC Comments at 23.

IP would also suggest that to the extent the FCC seeks standardized measures to benchmark ILECs to one another, IP believes that such benchmarking measures should be developed with that specific purpose in mind and without creating any presumption as to their appropriateness in the context of 251 and 271 implementation. As recognized by most commenters, the existing differences from ILEC-to-ILEC will limit the ability to create benchmarks. As such, the development of separate benchmark PMs will be necessarily limited in scope by operational differences.

CONCLUSION

IP appreciates the opportunity to reply to comments made in response to the PM NPRM. Although no process is perfect, the existing state development of PMs has largely worked. To the extent the FCC can build on state developed PMs such as those developed in Texas as a minimum standard providing a minimum level to support the viability of competition in other states and regions, the FCC can serve the public interest. On the other hand, if the ILECs are able to use this proceeding to limit the viability of competition by restraining the ability of PMs to be developed at the state level on factual developments in the industry, the goals of the act to promote competition will be severely hampered.

---

[7] This example exemplifies the larger theme herein. These are detail and volumous factual inquiries that are more appropriately addressed in the state context.

Respectfully submitted,

IP COMMUNICATIONS CORPORATION

By_____

Howard Siegel
Vice President of External Affairs and
Regulatory Policy
IP Communications Corporation
9430 Research Blvd
Echelon II, Suite 120
Austin, Texas 78759
512/418-0376

February 12, 2002

STATE OF TEXAS)
)
COUNTY OF TRAVIS)

AFFIDAVIT OF HOWARAD SIEGEL
ON BEHALF OF IP COMMUNICATIONS CORPORATION

Before me, the undersigned authority, on this 11th day of February 2002, personally appeared Howard Siegel, who, upon being duly sworn, states the following:

1. My name is Howard Siegel. I am over the age of 21, of sound mind, and am competent to testify as to the matters stated herein. I am the Vice President of Regulatory Policy for IP Communications Corporation ("IP"). I have personal knowledge of the facts contained herein.

2. The facts contained in these comments and related attachments are accurate. Moreover, I have personal knowledge as to this information through the due course of my duties in my capacity as IP's Vice President of Regulatory Policy.

Further Affiant sayeth not.

_____/s/_____
Howard Siegel

Sworn to and subscribed to before me this 11th day of February 2002, to certify which witness my hand and seal.

_____/s/_____
Notary Public in and for the State of Texas
My Commission expires:_____

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: John Wine, Chair
Cynthia L. Claus, Commissioner
Brian J. Moline, Commissioner

IN THE MATTER OF MONITORING SOUTHWESTERN BELL TELEPHONE COMPANY'S POST 271 PERFORMANCE AND REVEWING MODIFICATIONS TO THE PERFORMANCE MEASURES AND OTHER SECTIONS OF THE K2A	)))))	Docket No. 01-SWBT-999-MIS

REPLY COMMENTS OF IP COMMUNICATIONS CORPORATION AND BIRCH TELECOM OF KANSAS, INC. REGARDING SOUTHWESTERN BELL TELEPHONE COMPANY'S APPLICATIONS FOR APPROVAL OF MODIFICATIONS TO PERFORMANCE REMEDY PLAN AND PERFORMANCE MEASUREMENTS

COME NOW IP Communications Corporation ("IP") and Birch Telecom of Kansas, Inc. ("Birch") and hereby file the following reply comments in this docket.

I. Background

1. On August 22, 2001, Southwestern Bell Telephone Company ("SWBT") filed its application relating to modifications of the performance remedy plan and performance measures. On October 1, 2001, the Commission issued an order requiring the filing of comments on or before October 15, 2001.

2. IP and Birch separately filed comments on October 15, 2001. SWBT filed its response on October 29, 2001. Because SWBT's comments mischaracterizes comments from IP and Birch and because SWBT's position in this proceeding did not become apparent until after SWBT filed its response comments, IP and Birch (also referred to as the "Joint Commenters")

are compelled to file these reply comments as both clarification and as an opportunity to substantively respond to SWBT's position.

3. The pleadings to date are quite telling. The incorporation of the Texas six-month performance measure review should be a simple process. IP and Birch, as does SWBT, recognize the benefits of uniformity of performance measures and the use of the Texas results across the SWBT region. As a result, IP and Birch separately concluded that it is better to accept the Texas results as a package rather than trying to manipulate the process by trying to hold SWBT to the issues it lost in Texas while at the same time seeking another bite at the apple when the final outcome was less than favorable to the CLEC position. That conclusion is the only reasonable decision given the amount of resources devoted to the Texas process and the fact that Staff from all state commissions within the SWBT region had an opportunity to participate. SWBT, on the other hand, seeks to have its cake while eating the competition, too.

II. SWBT's Position and the Mistaken Discussion of the Positions of IP and Birch

3. In spite of the fact that both IP and Birch provided comments stating that the performance measure ("PM") results from Texas should be accepted as a package and that if SWBT is allowed to reopen issues that the CLECs would likely seek to reopen decisions with which they lack agreement,[8] SWBT somehow states that, "No commenter raises a single objection to these revisions and the Commission should thus approve them for use in Kansas."[9] Such a statement by SWBT seriously misstates the record and the positions of the parties.

4 While it is unfortunate that SWBT chose to mischaracterize the positions of IP and Birch, it is detrimental to competition and to the efficiency of the regulatory process to take

[8] See e.g., IP Comments at p. 2; Birch Comments at p. 4.

[9] SWBT Reply Comments at p. 2.

the multiple bite-at-the-apple approach that SWBT is seeking in this proceeding. Not only does SWBT seek to have this Commission make a blanket decision to be applied to all CLECs regardless of the CLEC providing any express agreement, but SWBT then argues that in the small number of issues that it lost, CLECs will be forced to engage in further arbitration. The irrationality of such a double standard is quite apparent. Regarding SWBT's specific claims regarding the opportunity to rearbitrate, IP and Birch agree with the written comments of AT&T Communications of the Southwest ("AT&T") and will not restate all of AT&T's comments here. It should suffice to say that the extensive six-month review process with a decision from the Texas Public Utility Commission that is appealable to Federal District Court was always contemplated as being the arbitration for the purpose of Attachment 17 for Texas. Secondarily, to the extent that SWBT sought involvement from other state commissions and sought that the Texas six-month review have a regional application, SWBT is estopped from arguing that a second arbitration is necessary for the State of Kansas. Instead, SWBT has its appellate rights to the Texas decision, and IP and Birch certainly agree that any modification to the PMs from any such appeal should be applicable in Kansas, as well.

III. Texas has Already Ruled on SWBT's Motion for Rehearing

5. It is also worthwhile to note that the Texas Public Utility Commission has already issued its oral ruling on SWBT's Motion for Rehearing. A written codification of that decision is anticipated shortly. As was customary throughout the Texas proceeding, there were some decisions that SWBT supported and CLECs opposed. And, there were some decisions that CLECs supported and SWBT opposed. Consistent with the initial comments of IP and Birch, in spite of their opposition to certain aspects of the Texas rulings, the Joint Commenters support the administrative and implementation efficiencies derived by adoption of the Texas decision as a

package, and therefore, are honor-bound to except the Texas rulings in total. SWBT, however, consistent with its response comments, does not seem to be under such restrictions. IP and Birch can only surmise that SWBT's position will be to accept the SWBT-favored components of the Texas order on its motion for rehearing as applicable to all CLECs in Kansas in the name of efficiency while demanding further arbitration on the SWBT-disfavored components. Efficiency, however, is not a one-sided phenomenon. The efficient determination and application of the PMs works in both directions.

III. Position and Recommendation

6. Regarding "where we go from here", Joint Commenters respectfully request that a close review of the comments of IP and Birch be taken. Contained in those comments are the building blocks that will not only assure the timely and efficient implementation of the PMs relating to the presently discussed six-month review, but also for the effective implementation for at least the duration of the K2A. SWBT and the CLEC all agree that there is a tremendous benefit by adopting a "uniformity" of practice relating to performance measures based on the record developed in the six-month review process. SWBT-wide PMs achieves benefits beyond the administrative. Uniformity also leads to easier data collection and reporting and therefore fewer errors.

IV. Conclusion

7. It is unfortunate that SWBT is at odds with the industry on such a fundamental issue. At the time initial comments were filed, there was an expectation that the differences between the parties would be minimal, if at all. SWBT, IP, and Birch are in general agreement on the goal of uniformity and on how to reach that goal. Unfortunately, we now know that

"uniformity" to SWBT means "uniformity" when SWBT wins and further litigation when SWBT loses. While IP and Birch laud SWBT's boldness to suggest such a position in public, SWBT's position certainly cannot be accepted as credible. Instead, SWBT's position demonstrates the need for a clear Commission order that provides certainty as to how the results of this six-month review and future six-month reviews will be handled in order to assure that the stated agreement on "uniformity" is achieved in practice. For detailed proposals on such a practice, IP and Birch incorporate by reference the proposals in their initial comments.

Respectfully submitted,

_____

David J. Stueven MO Bar No. 51274
Director, Regulatory – MO, OK, KS
IP Communications Corporation
6405 Metcalf, Suite 120
Overland Park, KS 66202
(913) 831-1013
Fax: (419) 710-5007

Email: dstueven@ip.net

_____

Howard J. Siegel TX Bar No. 00788412
Vice President of External Affairs and

Regulatory Policy

IP Communications Corporation
9430 Research Blvd., Suite 120
Austin, Texas 78759
Telephone: (512) 418-0376
Facsimile: (781) 394-6428
Email: hsiegel@ip.net

ATTORNEYS FOR IP COMMUNICATIONS CORPORATION

Respectfully submitted,

_____

Rose Mulvany Henry KS Bar No. 16209
BIRCH TELECOM OF KS, INC.
2020 Baltimore Avenue
Kansas City, MO 64108
(816) 300-3731
(816) 300-3350 (fax)
rmulvany@birch.com

ATTORNEY FOR BIRCH TELECOM OF KS, INC.

VERIFICATION

STATE OF MISSOURI)
) ss:
COUNTY OF JACKSON)

COMES NOW David J. Stueven, being of lawful age and duly sworn, who swears and affirms as follows:

1. My name is David J. Stueven, and I am an attorney for IP Communications Corporation. In that capacity, I am authorized to verify the foregoing pleading, and the information contained therein, on behalf of IP Communications Corporation.

2. The information contained in the foregoing document is true and accurate to the best of my knowledge and belief.

_____
David J. Stueven

Subscribed and sworn to before me this ____ day of _____, 2001.

_____
Notary Public

My Commission Expires:

VERIFICATION

STATE OF MISSOURI)
) ss:
COUNTY OF JACKSON)

Rose Mulvany Henry, of lawful age, being first duly sworn, on oath deposes and states:

That she is an attorney for Birch Telecom of Kansas, Inc. in the above-referenced matter; that she has read the above and foregoing document, knows and understands the contents thereof, and states that the statements and allegations contained therein are true and correct, according to her knowledge, information and belief.

_____

Rose Mulvany Henry

SUBSCRIBED AND SWORN TO before me this 15th day of October, 2001.

_____
Notary Public

My appointment expires:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this _____ day of _____, 2001, to:

Service List for:

Docket No. 01-SWBT-999-MIS

Andrew O. Isar
Telecommunications Resellers Association
4312 92nd Avenue N.W.
Gig Harbor, Washington 98335

Mr. Jeffrey Wagaman
Executive Director
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604

Lisa Creighton Hendricks
Mail Stop KSOPKJ0502
Sprint Communications Company, L.P.
5454 W. 110th Street
Overland Park, KS 66211

Eva Powers/Bret Lawson
Assistant General Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604

Robert A. Fox
Dana Green
Foulston & Siefkin, L.L.P.
1515 Bank IV Tower
534 Kansas Avenue
Topeka, Kansas 66603

Ms. Janet Buchanan
Chief of Telecommunications
Kansas Corporation Commission
1500 SW Arrowhead Road
Topeka, KS 66604

David J. Stueven
IP Communications Corporation
6405 Metcalf Avenue, Suite 120
Overland Park, KS 66202

Walker Hendrix
Citizens' Utility Ratepayer Board
1500 S.W. Arrowhead Road
Topeka, Kansas 66604-4027

C. Michael Lennen
Morris, Laing, Evans, Brock & Kennedy
200 West Douglas, Fourth Floor
Wichita, Kansas 67202-3084

Michael Jewell
AT&T Communications
919 Congress, Suite 900
Austin, TX 78701

Stephen F. Morris
MCI Worldcom
701 Brazos, Suite 600
Austin, Texas 78701

Mark P. Johnson
Amy E. Rush
Sonnenschein Nath & Rosenthal
4520 Main Street, Suite 1100
Kansas City, Missouri 64111

Edward J. Cadieux
Carol Keith
NuVox Communications
16090 Swingley Ridge Rd., Suite 500
Chesterfield, MO 63006

J. David Tate
Bruce A. Ney
Michelle B. O'Neal
Southwestern Bell Telephone Company
220 East Sixth Street, Room 515
Topeka, Kansas 66603-359

Howard J. Siegel
IP Communications Corporation
9430 Research Blvd., Suite 120
Austin, TX 78759

Rose Mulvany Henry
Birch Telecom of Kansas
2020 Baltimore
Kansas City, Missouri 64108

_____
Attorney for IP Communications Corporation